IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs August 20, 2002

STATE OF TENNESSEE v. JONATHAN D. ROSENBALM

Appeal from the Criminal Court for Sullivan County
No. S42,697 Phyllis H. Miller, Judge

No. E2002-00324-CCA-R3-CD
December 9, 2002

The defendant, Jonathan D. Rosenbalm, was convicted of one count of rape and one count of incest. See Tenn. Code Ann. §§ 39-13-503, 39-15-302. The trial court imposed concurrent sentences of twelve years and six years, respectively. In this appeal of right, the defendant claims that the evidence was insufficient to support the rape conviction and that the state impermissibly asked questions about his failure to make a statement to police. He also argues that the twelve-year sentence for rape was excessive and that the trial court erred by denying alternative sentencing. The judgments of the trial court are affirmed.

Tenn. R. App. P. 3; Judgments of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and ROBERT W. WEDEMEYER, JJ., joined.

Steve McEwen, Mountain City, Tennessee (on appeal), and Leslie Hale, Assistant Public Defender (on appeal and at trial), for the appellant, Jonathan D. Rosenbalm.

Paul G. Summers, Attorney General & Reporter; Peter M. Coughlan, Assistant Attorney General; and Barry Staubus, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

In February of 1999, the victim, S.R.,[1] age sixteen, lived with her mother, Gloria Miller, in Bristol. On the sixth of that month, the defendant, who was the biological father of the victim, drove to Bristol for a visit. He had not seen her in over a year. At approximately 10:00 p.m., the defendant arrived at the residence of the victim and drove her to a Scottish Inns motel, where he rented a room. The two had dinner at a nearby Burger King and returned to the motel where they began to drink beer which had been in the bed of the defendant's truck. The victim estimated that she drank three or four beers. She did not know how many the defendant had consumed.

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[1] It is the policy of this court not to reveal the names of children who are victims of sex crimes.

At trial, the victim recalled that she and the defendant were discussing school and family life when the defendant remarked that she could be a stripper. She testified that the defendant then directed her to "show him [her] lungs," which she interpreted as a reference to her breasts. When she refused, the defendant raised her shirt and bra and informed her that he and another man had once compared penises to see who had the "biggest." The victim testified that the defendant then removed his penis from his pants and placed her hand on it. When the victim asked to go home, the defendant refused, explaining that he was expecting a telephone call. The victim then lay on one of the beds and asked the defendant to wake her and drive her home after his telephone call. The victim testified that she went to sleep while fully clothed and lying on her stomach. She recalled that when she awoke, the defendant was penetrating her vagina with his penis. She testified that she immediately tried to push the defendant away and that he instructed her to be quiet. Afterward, at approximately 4:00 a.m., the victim dressed and the defendant drove her back to her mother's residence.

The victim did not report the incident to her mother until a month or two later. At that point, she spoke with Detective Matt Austin of the Bristol Police Department, who asked that she place a recorded telephone call to the defendant. The tape was played for the jury. During the conversation, the following exchange took place:

[VICTIM]: Had you just been drinking too much or —
[DEFENDANT]: Yeah, Yeah. And I don't, well, I don't know, . . . it's hazy, you know.
[VICTIM]: Huh?
[DEFENDANT]: I don't remember a lot of it.
[VICTIM]: Well, what if I'm pregnant.
[DEFENDANT]: There ain't no way.

* * *

[DEFENDANT]: And no, I'm not trying to say nothing happened. I had on protection.
[VICTIM]: Well, how could you do something like that to me, Daddy?
[DEFENDANT]: I didn't plan it honey, I don't know, I don't know how it happened. I mean I didn't plan for it to happen or nothing else, I mean, you haven't said nothing to your Momma about it, have you?

* * *

[DEFENDANT]: I didn't [m]ean for it to happen, like I said, . . . I'm sorry. You know what I'm saying. I'm totally sorry. But you know what's going to happen if you tell anybody, don't you?
[VICTIM]: What?
[DEFENDANT]: They're going to put me in jail. Forever.

* * *

[DEFENDANT]: I mean, I'm sorry that it happened . . . the next day, I couldn't even remember what I had done or nothing. I didn't even hardly remember

none of it, I was so drunk. I shouldn't have been out nowheres, driving or anything else.

* * *

[VICTIM]: Well, see, I'm scared that I might be pregnant, how can you be sure that I'm not.

[DEFENDANT]: [S.R.], I didn't do that, I didn't go that far, or nothing else. Plus I had a condom on.

[VICTIM]: Okay, you didn't go that far, but you had a condom on?

[DEFENDANT]: No, I said, I didn't, you know, youngun, you can't get pregnant unless somebody gets off, you know what I'm saying.

[VICTIM]: Yeah.

[DEFENDANT]: I didn't ejaculate

[VICTIM]: You hurt me. I mean I woke up, and then you were on top of me.

[DEFENDANT]: You don't remember what happened?

[VICTIM]: No. No, I don't. I remember I went to sleep, and you told me that you were expecting a phone call, and then, I woke up with you on top of me.

[DEFENDANT]: You took your pants off?

[VICTIM]: No, I did not.

[DEFENDANT]: Okay. Honey, I don't want to argue about it. . . .

At trial, the victim denied that she had behaved in a sexually provocative manner and insisted that she had not removed any of her clothing and had not consented to intercourse. While the victim acknowledged that she had consumed alcoholic beverages on prior occasions, she denied being intoxicated at the time of the incident.

The defendant, who was divorced from the victim's mother in 1993, had moved to Charlotte, North Carolina. He testified that on the date of the incident, he had arrived in Bristol at approximately 6:00 in the evening, had eaten at a Wendy's restaurant, and had drunk beer at the El Rancho Bar until it was time for his visitation with the victim. The defendant estimated that he drank approximately 10 beers and was "drunk" by the time of his arrival. The defendant stated that after he checked into a motel, he unloaded his things and talked with the victim until she asked him to drive to a trailer park so that she could purchase marijuana. The defendant claimed that he gave the victim $20 to purchase the drug but that she was unsuccessful in finding a supplier. The defendant contended that they returned to the motel room and drank beer while he made several telephone calls searching for marijuana. He testified that the victim claimed that she had been caught topless in a school locker room by some boys and that he responded by asking to see her breasts. The defendant insisted that the victim voluntarily raised her shirt and bra. He admitted touching her breast for "a second" when she did so. He stated that when the victim indicated that she intended to lie down, he replied that he was waiting on a return phone call. The defendant testified that about five minutes later, when he nudged the victim and told her that it was time to leave, the victim "rolled over," removed her clothing, and "spread her legs." The defendant

acknowledged that he sexually penetrated the victim and claimed that she said nothing until after her climax, at which point she said, "Okay, that's enough." The defendant maintained that the victim offered no resistance.

I

Initially, the defendant argues that the evidence was insufficient to support his conviction for rape. On appeal, of course, the state is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the proof are matters entrusted to the jury as the trier of fact. Byrge v. State, 575 S.W.2d 292, 295 (Tenn. Crim. App. 1978). When the sufficiency of the evidence is challenged, the relevant question is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. Tenn. R. App. P. 13(e); State v. Williams, 657 S.W.2d 405, 410 (Tenn. 1983). Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact. Liakas v. State, 199 Tenn. 298, 286 S.W.2d 856, 859 (1956). Because a verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. State v. Evans, 838 S.W.2d 185, 191 (Tenn. 1992).

The applicable statute provides, in pertinent part, as follows:

> (a) Rape is unlawful sexual penetration of a victim by the defendant or of the defendant by a victim accompanied by any of the following circumstances:
>
> (1) Force or coercion is used to accomplish the act;
>
> (2) The sexual penetration is accomplished without the consent of the victim and the defendant knows or has reason to know at the time of the penetration that the victim did not consent;
>
> (3) The defendant knows or has reason to know that the victim is mentally defective, mentally incapacitated or physically helpless; or
>
> (4) The sexual penetration is accomplished by fraud.

Tenn. Code Ann. § 39-13-503(a). "Sexual penetration" is defined as "sexual intercourse, . . . or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of the victim's, the defendant's, or any other person's body, but emission of semen is not required." Tenn. Code Ann. § 39-13-501(7).

Here, the indictment charged the defendant with rape under subpart (a)(2):

> The Grand Jurors for Sullivan County, Tennessee, duly empaneled and sworn, upon their oath, present and say that JONATHAN D. ROSENBALM on or about February 6, 1999 . . . did unlawfully, feloniously, knowingly and intentionally

sexually penetrate [S.R.] without her consent, and the said JONATHAN D. ROSENBALM, knowing or having reason to know at the time of the penetration that the victim did not consent . . . .

The victim testified that the defendant sought permission to see her breasts and that when she refused, he lifted her blouse and bra. She stated that he exposed his penis and that later, after falling asleep, she awoke to find him engaging in sexual intercourse. She testified that she immediately pushed the defendant away and that he warned her to be quiet. While the defendant admitted to having had sexual intercourse with the victim, he contended that it was consensual and that he was guilty only of incest. The issue of consent presented a classic jury question. Haynes v. State, 540 S.W.2d 277, 278 (Tenn. Crim. App. 1976). It was the prerogative of the jury to accredit the victim's testimony. See State v. Summerall, 926 S.W.2d 272, 275 (Tenn. Crim. App. 1995). Consequently, there is sufficient evidence to establish that the defendant knew or should have known that his sexual advances upon the victim were not welcome. In our view, a rational trier of fact could have found beyond a reasonable doubt that the defendant was guilty of rape.

II

Next, the defendant contends that his due process rights were violated when the assistant district attorney general questioned him about his post-arrest silence. In particular, the defendant complains about the following exchange during his cross-examination:

Q Now, you talked to Matt Austin, didn't you? You refused to give him a statement when he wanted to talk to you about what happened, isn't that true?
A Yes, sir, I sure did.
Q You didn't tell him your side of things then, did you?
A He didn't tell me anything either. . . .
Q He just asked you what happened, didn't he?
A He just – he didn't even tell me what it was about. He didn't even offer to tell me what . . . anything was about. He just come to me like that I should offer my side of the story to him without him even telling me other than he was Matt Austin from the Bristol Tennessee Police Department, and that's what –
Q He never told you that your daughter had accused you of having sex with her?
A No, sir, he did not.
Q Didn't tell you a thing?
A No, sir.
Q Just wanted you to try to guess what happened?
A Yes, sir, –
Q And when he –
A – that's what he did in the Wise County Jail.
Q And he read an Advice of Rights Form?
A No . . . .

When defense counsel did not object, the trial court unilaterally stopped the questioning and, after a bench conference, instructed the jury to disregard those questions and answers.

In State v. Braden, 534 S.W.2d 657 (Tenn. 1976), the defendants were arrested after government agents observed them tampering with a cache of marijuana under surveillance. At trial, the defendants testified "to the effect that they were exploring . . . when they came upon the [marijuana cache] by sheer accident and removed a small amount of the marijuana." Id. at 659. When cross-examining one of the defendants, the district attorney questioned him regarding his silence in the face of the arresting officer; later, the district attorney emphasized the defendants' silence in his argument to the jury. The jury convicted the defendants of possession of marijuana with intent to resell and, on appeal, the defendants challenged the prosecutor's argument as contrary to their right to remain silent. Holding that the district attorney's actions required reversal, our supreme court nevertheless ruled that evidence of a defendant's pre-trial silence could "be admitted [but] with caution and then only where such silence is patently inconsistent with [the] defendant's testimony." Id. at 660. The court further observed as follows:

> If the standard to be met by the prosecution in introducing evidence of pretrial silence of a defendant, and in arguing to the jury a position based on defendant's pretrial silence, was any less strict, a defendant would be on the horns of a dilemma when arrested and advised of his Miranda rights. He would have to assert his innocence immediately or not at all, except at the peril of having the prosecution using his initial silence against him. This would have a chilling effect on a defendant's assertion of his constitutional right to remain silent and, consequently, can not be permitted.

Id.

Later, in Doyle v. Ohio, the United States Supreme Court held that a defendant who remains silent after arrest and Miranda warnings cannot later be impeached at trial with his silence:

> "[W]hen a person under arrest is informed, as Miranda requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, . . . it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony. . . ."

426 U.S. 610, 610 (1976) (quoting United States v. Hale, 422 U.S. 171, 182-83 (1975) (White, J., concurring)). Later, in Jenkins v. Anderson, our highest court held that impeachment of a criminal defendant with his pre-arrest silence is constitutionally permissible:

> In this case, no governmental action induced petitioner to remain silent before arrest. The failure to speak occurred before the petitioner was taken into custody and

> given Miranda warnings. Consequently, the fundamental unfairness present in Doyle is not present in this case. . . .

447 U.S. 231, 244 (1980). In Fletcher v. Weir, 455 U.S. 603 (1982), the Supreme Court addressed the issue of impeachment of a criminal defendant with silence occurring after arrest but before Miranda warnings. Again distinguishing Doyle, the court held that impeachment with such silence is not violative of due process:

> In the absence of the sort of affirmative assurances embodied in the Miranda warnings, we do not believe that it violates due process of law for a State to permit cross-examination as to post-arrest silence when a defendant chooses to take the stand. A State is entitled, in such situations, to leave to the judge and jury under its own rules of evidence the resolution of the extent to which post-arrest silence may be deemed to impeach a criminal defendant's own testimony.

Id. at 607.

Recently, in State v. Chris Haire, No. E2000-01636-CCA-R3-CD, (Tenn. Crim. App., at Knoxville, Jan. 22, 2002), a panel of this court examined the continued viability of our high court's decision in Braden after Doyle and its progeny. The panel determined that Braden, insofar as it allowed any comment on post-arrest, post-Miranda silence, did not survive Doyle. It concluded, however, that Braden's qualified use of a defendant's silence continued to apply in Weir-type situations involving post-arrest, pre-Miranda silence:

> [A]s we previously noted, Doyle applies to impeachment use of post-arrest, post-Miranda warnings silence as contrasted with impeachment use of post-arrest, pre-Miranda warnings silence, the latter of which does not run afoul of constitutional due process per the Weir decision. Consequently, we are of the opinion that Braden's "patently inconsistent" qualification is still viable in the factual context presented in Weir. The result is that Tennessee restricts impeachment use of a defendant's post-arrest silence that precedes Miranda warnings to those situations wherein it is patently or blatantly inconsistent with trial testimony.

Id., slip op. at 18.

The issue presented in this case is a close one. If the police had neither arrested the defendant nor provided him with Miranda warnings, then the state's cross-examination of the defendant regarding his silence was permissible pursuant to Jenkins v. Anderson. On the other hand, if the defendant had been both arrested and advised of his Miranda rights, the cross-examination would have been unconstitutional under Doyle. Finally, if the defendant had been arrested but had not received Miranda warnings, the very scenario presented in Weir, a cross-examination of the defendant about his silence would have been permissible only if it was "patently or blatantly inconsistent with [his] trial testimony." See id. In our view, application of this test would have

required exclusion of the defendant's pre-trial silence. Any inconsistency between the defendant's silence and his exculpatory trial testimony would not qualify as blatant. See Braden, 534 S.W.2d at 660-61.

Here, however, the record is unclear as to whether the defendant had been arrested or advised of his Miranda rights at the time that he was interviewed by Detective Matt Austin. The detective did not testify at trial and the only evidence in the record is the defendant's testimony on cross-examination, which was interrupted by the trial judge. No further hearing was held on the matter. Although the defendant's testimony suggests that the interview occurred at a county jail in Virginia, where the defendant resided, this court cannot conclude from this record that the defendant was already under arrest. Moreover, the defendant testified that Detective Austin had not read the Miranda rights to him. There is no indication in the record that the defendant had been advised of his Miranda rights by anyone else or that he had relied on that advice in remaining silent. Because it is the duty of the appellant to supply an adequate record for a determination on the merits, the cross-examination cannot be classified as error. See Tenn. R. App. P. 24; State v. Coolidge, 915 S.W.2d 820, 826 (Tenn. Crim. App. 1995), overruled on other grounds by State v. Troutman, 979 S.W.2d 271 (Tenn.1998).

Moreover, any error would have been harmless beyond a reasonable doubt. The defendant's explanation for his silence – that Detective Austin had failed to advise him of the subject of the interview – was plausible. Because the detective did not testify, the explanation was uncontradicted. Additionally, after the trial court interrupted the cross-examination, it provided the jury with a proper curative charge that included an admonition to disregard all of the questions and answers regarding the defendant's silence, an instruction that all persons have a right not to incriminate themselves, and a confirmation by show of hands that the jurors could disregard the improper testimony. Finally, the defendant did not deny having had intercourse with the victim, but insisted that it was consensual. Silence upon being confronted by Detective Austin would likely have been understandable under that circumstance.

III

Finally, the defendant contends that the trial court erred by ordering the maximum sentence of twelve years and by denying alternative sentencing. The state disagrees.

At the sentencing hearing, the victim testified that after the rape, she had problems at home and became suicidal. She stated that her academic performance declined and that she lost approximately twenty pounds. Although the victim had some counseling, she continued to have nightmares. While expressing fear of the defendant, the victim acknowledged that he had been remorseful and had never threatened her.

Mary Margaret Denton, a therapist at the Children's Advocacy Center, testified that she met with the victim on a weekly to biweekly basis beginning in April of 1999 for approximately two months. Afterward, she saw the victim on an intermittent basis because the victim's father had been released on bail and the victim was less willing "to share her feelings." Ms. Denton described the

victim as initially very sad and distraught, having trouble with her grades and experiencing dramatic weight loss.

Gregory M. Austin, the owner of Colt Equipment and Repair, testified for the defense. He stated that he would hire the defendant as a mechanic at his Pound, Virginia, shop if the defendant were to be granted probation.

At the conclusion of the sentencing hearing, the trial court found and applied four enhancement factors: (1) that the defendant has a previous history of criminal convictions or behavior in addition to those necessary to establish the appropriate range; (6) that the personal injuries inflicted upon the victim were particularly great; (7) that the offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement; and (15) that the defendant abused a position of private trust. See Tenn. Code Ann. §§ 40-35-114(1), (6), (7), (15). The trial judge assigned great weight to factors (1), (7) , and (15), determined that no mitigating factors were applicable, and set the defendant's sentences at the maximums within their applicable ranges. See Tenn. Code Ann. §§ 39-13-503(b) (establishing rape as Class B felony); 39-15-302(b) (establishing incest as a Class C felony); 40-35-112(a)(2) – (3) (setting Range I sentence for Class B felony at eight to twelve years and Range I sentence for Class C felony at three to six years).

When there is a challenge to the length, range, or manner of service of a sentence, it is the duty of this court to conduct a de novo review with a presumption that the determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). This presumption is "conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances." State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991); see State v. Jones, 883 S.W.2d 597, 600 (Tenn. 1994). "If the trial court applies inappropriate factors or otherwise fails to follow the 1989 Sentencing Act, the presumption of correctness falls." State v. Shelton, 854 S.W.2d 116, 123 (Tenn. Crim. App. 1992). The Sentencing Commission Comments provide that the burden is on the defendant to show the impropriety of the sentence. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

Our review requires an analysis of (1) the evidence, if any, received at the trial and sentencing hearing; (2) the presentence report; (3) the principles of sentencing and the arguments of counsel relative to sentencing alternatives; (4) the nature and characteristics of the offense; (5) any mitigating or enhancing factors; (6) any statements made by the defendant in his own behalf; and (7) the defendant's potential for rehabilitation or treatment. Tenn. Code Ann. §§ 40-35-102, -103, -210; State v. Smith, 735 S.W.2d 859, 863 (Tenn. Crim. App. 1987).

In calculating the sentence for a Class B, C, D, or E felony conviction, the presumptive sentence is the minimum in the range if there are no enhancement or mitigating factors. Tenn. Code Ann. § 40-35-210(c). If there are enhancement but no mitigating factors, the trial court may set the sentence above the minimum, but still within the range. Tenn. Code Ann. § 40-35-210(d). A sentence involving both enhancement and mitigating factors requires an assignment of relative weight for the enhancement factors as a means of increasing the sentence. Tenn. Code Ann. § 40-35-

210(e). The sentence must then be reduced within the range by any weight assigned to the mitigating factors present. Id.

The defendant asserts that the trial court erred by applying enhancement factor (1), that he has a previous history of criminal convictions or behavior in addition to those necessary to establish the appropriate range. See Tenn. Code Ann. § 40-35-114(1). He argues that his prior criminal record consisted only of a misdemeanor conviction for driving under the influence and that the trial court should not have considered his conviction for failure to appear because it occurred in connection with the charges in this case. He also contends that the trial judge erred by considering that he provided alcoholic beverages to the victim on the night of the crime because it occurred contemporaneously with the crime.

The presentence report reflects that at the time of sentencing, the defendant had been convicted of DUI in 1998. Additionally, approximately one month prior to the sentencing hearing, the defendant pled guilty to felony failure to appear. That the conviction occurred after the rape and incest is irrelevant. This court has previously held that "[t]rial [courts] can consider criminal convictions or any other criminal behavior which occurred prior to the sentencing hearing as being 'a previous history of criminal convictions or criminal behavior' under Tenn. Code Ann. § 40-35-114(1), regardless of whether the convictions or behavior occurred before or after the criminal conduct under consideration." State v. Ed Waters, No. 01-C-01-9106-CR-00158, slip op. at 6-7 (Tenn. Crim. App., at Nashville, Feb. 20, 1992). Further, the defendant acknowledged at trial that he had provided the minor victim with beer not only on the night of the crime, but on prior occasions as well. In our view, enhancement factor (1) was properly applied.

The defendant next challenges the application of enhancement factor (6), that the personal injuries inflicted upon the victim were particularly great. See Tenn. Code Ann. § 40-35-114(6). While conceding that the victim received counseling as a result of the offense, he maintains that the treatment was only for a brief period and that she was doing well in school at the time of sentencing.

The term "personal injury" contained in enhancement factor (6) embraces the "emotional injuries and psychological scarring sustained by the victim of a sexual offense." State v. Melvin, 913 S.W.2d 195, 203 (Tenn. Crim. App. 1995). Before this factor may be applied, however, it must be demonstrated that the emotional injuries and psychological scarring were "particularly great." Id. Recently, in State v. Arnett, 49 S.W.3d 250, 260 (Tenn. 2001), our supreme court held that "application of [enhancement factor (6)] is appropriate where there is specific and objective evidence demonstrating how the victim's mental injury is more serious or more severe than that which normally results from this offense. Such proof may be presented by the victim's testimony, as well as the testimony of witnesses acquainted with the victim. In this instance, because the victim became suicidal after the offense, experienced a dramatic weight loss, and performed poorly in school, the emotional injuries qualified as more severe than the ordinary result. Thus, the trial court did not err by its application of enhancement factor (6). See State v. Williams, 920 S.W.2d 247, 259-60 (Tenn. Crim. App. 1995) (holding that rape victim's injuries were "particularly great" and that enhancement

factor (6) had been properly applied where victim experienced periods of depression and low self-esteem, began to perform poorly at school, and sought weekly counseling for a period of time).

The defendant also contends that the trial court placed too much weight on enhancement factor (7), that the offense involved a victim and was committed to gratify his desire for pleasure or excitement. See Tenn. Code Ann. § 40-35-114(7). In support of this argument, the defendant cites the fact that he did not climax while having sexual intercourse with the victim. In considering this factor, the trial court made the following observations:

> Number seven, the offense involved a victim and was committed to gratify the defendant's desire for pleasure or excitement. That was born out by the facts of this case. It wasn't because you hated women. It wasn't because you hated daughters. Purely it was for your pleasure and excitement. You planned it out. You testified what a good loving daddy you were. You hadn't seen either one of your children for a year or a year and a half, yet when you came to town you didn't bother about the little son. I think he was at the grandmother's, but . . . instead of going straight over there, it seems like you went to a bar or something and then you didn't try to have any visitation or anything with the little boy. You wanted that little daughter and you wanted her alone and you wanted her drinking and you wanted to have sex with her. And it was just really evidence to the [c]ourt that . . . you did it for your pleasure and your excitement.

The weight given each enhancement and mitigating factor is left to the discretion of the trial court as long as the trial court complies with the purposes and principles of the sentencing act and its findings are supported by the record. Tenn. Code Ann. § 40-35-210, Sentencing Commission Comments; State v. Moss, 727 S.W.2d 229, 238 (Tenn. 1986); State v. Kelley, 34 S.W.3d 471, 479 (Tenn. Crim. App. 2000). That the trial court ascribed particular weight to enhancement factor (7) was not error.

The defendant also claims that the trial court erred by failing to apply three mitigating factors: that he contends should have been applied by the trial court: (1) that his conduct neither caused nor threatened serious bodily injury, see Tenn. Code Ann. § 40-35-113(1); (2) that he had an excellent work history, see Tenn. Code Ann. § 40-35-113(13) ("[a]ny other factor consistent with the purposes of this chapter"); and (3) that he had studied the Bible while incarcerated, see id.

Initially, the defendant is not entitled to the application of mitigating factor (1), that his conduct neither caused nor threatened serious bodily injury. The victim sustained psychological and emotional injuries, which are encompassed by the term "serious bodily injury," as a result of the offense. See State v. Smith, 910 S.W.2d 457, 461 (Tenn. Crim. App. 1995); State v. Willie Givens, No. M2000-02883-CCA-R3-CD (Tenn. Crim. App., at Nashville, June 28, 2002). Additionally, the defendant provided the minor victim with alcoholic beverages prior to the assault. See State v. McKnight, 900 S.W.2d 36, 55 (Tenn. Crim. App. 1994) (rejecting mitigating factor (1) where the

defendant provided the minor victims with alcoholic beverages prior to sexually abusing them). The trial court, therefore, properly rejected mitigating factor (1).

Next, "a defendant's work history is relevant to his or her potential for rehabilitation, a factor to be considered in determining the length of the sentence." State v. Kelley, 34 S.W.3d 471, 483 (Tenn. Crim. App. 2000). Here, the trial court considered the defendant's work history and determined that it was not enough to merit mitigation consideration:

> I don't know that I'd characterize it as an excellent work history. . . . I'd characterize it as a good work history. About all that's in here is about Col[t] Equipment and Repair and of course Mr. Austin testified. Apparently you are a skilled person, a person somebody would want to work for them as far as your level of capabilities go on the job. . . . You have a good work history. I wouldn't call it excellent. . . .

The defendant is a "certified mechanic." The trial court classified the work history as "good" but was hesitant to describe it as "excellent." "Good" is enough to merit application of the factor, even though the weight attached might be relatively slight.

Finally, the defendant contends that his study of the Bible while incarcerated qualified as a mitigating factor. The record contains several certificates indicating that the defendant completed various Bible-related correspondence courses while in jail. While his effort is laudable and may suggest a desire for rehabilitation on the part of the defendant, the trial judge, who saw the witness and heard his testimony, is in a better position to assess the weight of the factor in assessing the sentence.

In sum, the trial court properly applied enhancement factors (1), (6), (7), and (15). See Tenn. Code Ann. § 40-35-114. Two possible mitigating factors warranted little weight. A twelve-year sentence is appropriate under the circumstances.

The defendant also argues that the trial court erred by denying alternative sentencing. Because, however, the sentence is twelve years, the defendant is not eligible for probation. See Tenn. Code Ann. § 40-35-303(a) ("[a] defendant shall be eligible for probation . . . if the sentence actually imposed upon such defendant is eight (8) years or less"). Likewise, because the defendant was convicted of a crime against the person as provided in Tennessee Code Annotated title 39, chapter 13, he is ineligible for a community corrections sentence. See Tenn. Code Ann. § 40-36-106(a)(2).

Accordingly, the judgments of the trial court are affirmed.

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GARY R. WADE, PRESIDING JUDGE